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SOTON BILI & ANOR

v.

KHAJIJAH LED & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CIVIL APPEAL NO: 12-51-2006-III]
29 APRIL 2008

C ***DAMAGES:*** *Personal injuries - Road accident - Damages, assessment of - Cost of prosthesis - Whether a deduction should be given - Circumstance of each individual case - Whether sessions court judge had exercised discretion judiciously*

D ***DAMAGES:*** *Quantum - Multiplier - Pre trial loss of income - Partial loss of future earnings - Whether an overlap of multipliers occurred - Whether allowable under s. 28 Civil Law Act 1956*

CIVIL LAW ACT: *Damages - Personal injuries - Quantum - Multiplier - Pre trial loss of income - Partial loss of future earnings -*
E *Whether an overlap of multipliers occurred - Whether allowable under s. 28 Civil Law Act 1956*

DAMAGES: *Personal injuries - Road accident - Damages, assessment of - Award for pain and suffering - Application to change award given*
F *- Whether should be rejected - Claim for costs of helper - Whether there were valid reasons for a helper*

This was an appeal and cross appeal against the decision of the sessions court judge in respect of a claim for personal injuries and
G damages suffered as a result of a road accident. Briefly, on 9 September 1999, the second respondent was a passenger in a van driven by the first respondent which collided with a Toyota Hilux driven by the first appellant coming from the opposite direction. The collision occurred when the first appellant
H encroached onto the van's path of travel. As a result of the accident, the second respondent who was then 35 years of age and operating a canteen earning RM65 a day, suffered personal injuries and was hospitalized immediately after the accident. After a full trial, the learned sessions court judge found that the accident
I was solely caused by the negligence of the first appellant and accordingly entered judgment against the appellants. The appeal by the first appellant concerned only the quantum of damages awarded for the following (i) cost of prosthesis: RM108,730; (ii)

pre-trial loss of income: RM115,115 and (iii) partial loss of future earnings: RM114,720. As for the cross appeal by the second respondent, it concerned two items (a) the sum of RM99,000 awarded for pain and suffering and (b) the disallowance of second respondent's claim for costs of a helper.

Held:

(1) In respect of the cost of prosthesis of RM108,730, it was alleged that the sessions court judge had erred in not reducing the amount of RM108,730 by 1/4 deduction for contingencies, vicissitudes of life and/or taking into account the accelerated payment. Whether or not a 1/4 deduction should be given is a matter of discretion on the part of the judge and the circumstance of each individual case. The sessions court judge's decision in not making the deduction could not be faulted as she had exercised her discretion judiciously. Hence, the appeal in respect of the costs of prosthesis was dismissed. (paras 6 & 7)

(2) Looking at the plain words of s. 28A Civil Law Act 1956, the appellant was correct when it contended that the sessions court judge had erred when she used the period of 17 years in calculating the second respondent's loss of earnings. What the learned sessions court judge did resulted in an overlap of multipliers or in the use of two multiplier periods which was not allowable under s. 28A of the Civil Law Act 1956. The correct and statutory multiplier is ten years. Having read and analyzed the cases on s. 28A of the Civil Law Act 1956, this court agreed with what was stated in the *Sumarni* case. The appeal in respect of the pre trial loss of income and partial loss of future earnings were allowed. The amount of loss for future earnings was reduced to the sum of RM149,531. (paras 14 & 16)

(3) As for the cross appeal, the respondent had not showed where the learned sessions court judge had applied the wrong principle of law in her deliberation and hence the request to change the award of RM99,000 should be rejected. Further, the sessions court judge had considered the factor as to whether the respondent needed a helper and made a finding that she did not need one based on the evidence of PW7, the prosthetist. Again, the learned sessions court judge should not

A be faulted as she had provided valid reasons for her decision in not awarding any damages for the cost of hiring a helper. (paras 22, 23 & 24)

[Order accordingly.]

B **Case(s) referred to:**

Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004] 4 CLJ 127 HC ***(refd)***

Cheng Bee Teik & Ors v. Peter Selvaraj & Anor [2005] 2 CLJ 839 CA ***(refd)***

Dirkje Pieternella Halma v. Mohd Noor Baharom & Ors [1990] 2 CLJ 167;
C *[1990] 1 CLJ (Rep) 99 SC* ***(refd)***

Fadzly Nor Rahim & Anor v. Chang Foh Chin [2008] 1 PIR 194 ***(dist)***

Looi Gnan Peng v. Bay Tong Hai [2005] 1 CLJ 685 CA ***(refd)***

Sumarni v. Yow Bing Kwong & Ors [2008] 3 CLJ 489 ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
D

Tang Tiew Yong & Ors v. Wong Jong Hoon & Anor [2002] 7 CLJ 455 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A(2)(d)(ii)

E *For the appellants - Derbe Tang; M/s Chew Jugah Wan Ullok & Co*
For the respondents - Sarbjit Singh Khaira; M/s Khaira & Co

Reported by Suhainah Wahiduddin

F

JUDGMENT

David Wong Dak Wah J:

Introduction

G

[1] Before me is an appeal and cross appeal against the decision of the learned Sessions Court Judge in respect of a claim for personal injuries and damages suffered as a result of a road accident.

H

[2] The brief facts of the case are these. On 9 September 1999 the 2nd respondent (who was the 2nd plaintiff in the court below) was a passenger in a van driven by the 1st respondent heading in the direction of Kuching *via* Tabuan Jaya. The van
I collided with a Toyota Hilux driven by the 1st appellant (who was the 1st defendant in the court below) coming from the opposite

direction. The collision occurred when the 1st appellant encroached onto the van's path of travel. As a result of the accident the 2nd respondent, who was then 35 years of age and operating a canteen earning RM65 per day, suffered personal injuries and was hospitalized immediately after the accident. The injuries sustained by the 2nd respondent were as follows:

(a) Severe crush injury to left ankle and left foot.

(b) Compound grade III B supracondylar fracture left femur.

(c) Compound grade I fracture proximal shaft left femur.

(d) Closed fracture superior and inferior pubic rami.

(e) Fracture left patella.

(f) Laceration wound right inguinal region, 1 cm. 5

(g) Stiff left knee with range of movement up to 10-40 degrees.

[3] After a full trial, the learned Sessions Court Judge found that the accident was solely caused by the negligence of the 1st appellant and accordingly entered judgment against the appellants.

[4] The appeal by the 1st appellant concerned only the quantum of damages awarded for the following:

1. Cost of Prosthesis: RM108,730;
2. Pre-trial loss of income: RM115,115; and
3. Partial loss of future earnings: RM114,720.

[5] As for the cross appeal by the 2nd respondent, it concerned two items:

1. The sum of RM99,000 awarded for pain and suffering; and
2. The disallowance of 2nd respondent's claim for costs of a helper.

Appeal

[6] In respect of the Cost of Prosthesis of RM108,730, Ms Derbe Tang (Ms Tang) submitted that the learned Sessions Court Judge had erred in not reducing the amount of RM108,730 by

A 1/4 deduction for contingencies, vicissitudes of life and/or taking into account the accelerated payment. She relied on the case of *Cheng Bee Teik & Ors v. Peter Selvaraj & Anor* [2005] 2 CLJ 839 and *Bujang bin Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127. Whether or not a 1/4 deduction should be given is a matter
B of discretion on the part of the judge and the circumstance of each individual case. Ms Tang in fact agrees with me on that principle of law. Mr. Sarbjit Singh Khaira (Mr. Khaira), counsel for the 1st respondent in his rebuttal submission set out the reasons why the learned Sessions Court Judge did not make the 1/4
C deduction and they were:

1. The foot needs to be changed every two years at the cost of RM880 per change.

D 2. Socket needs to be changed at least once at the cost of RM800.

3. Netting needs to be changed every six months at the cost of RM25 per change.

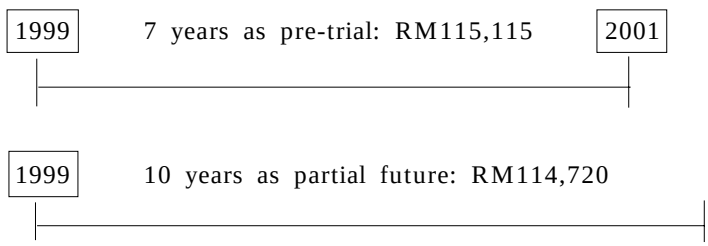
E 4. The life span of Modular III is only six years.

[7] I cannot fault the learned Sessions Court Judge's decision in not making the deduction as she had exercised her discretion judiciously. At this juncture, let me express my disappointment that
F the Insurance Company had not paid a single cent to the 2nd respondent. I am fully aware that the judgment was only finalized on 19 October 2007 and there was an appeal. That in my view is not an excuse as the decision was delivered on 1 December 2006 and the Insurance Company should have taken action to pay the
G 2nd respondent whatever amount that they did not dispute, for example, the Cost of Prosthesis of RM108,730. The only dispute Ms Tang is making here is the non deduction of the 1/4 for contingencies, vicissitudes of life and/or taking into account the accelerated payment. The insurance company could have made
H payment for the sum of RM81,547.50 which is an amount after a 1/4 deduction. Insurance companies must realize that they have a corporate and moral duty to pay the insured as soon as possible. In the present case, the evidence showed that the 2nd respondent could not pay PW7 the prosthetist for the use of the
I prosthetic limb and had to rely on the charity of PW7. In my view this is a factor which is relevant for me to decide whether or not this court should give a 1/4 deduction.

[8] For the reasons stated above, I reject Ms Tang's submission on this point.

[9] I now come to the award of the pre trial loss of income and partial loss of future income. Ms Tang submitted that the learned Sessions Court Judge was wrong and this was how she put it:

> 15 The Learned Sessions Court Judge assessed the RM115,115 pretrial loss of income as follows (pg. 49 of Judgment):
>
> 15.1 **Multiplicand:** RM1,495 per month x 11 months a year [Note: The Court held that the 2nd Plaintiff was only working/earning 11 months a year at that time.]
>
> 15.2 **Multiplier:** 7 years [ie, from **1999** (date of accident) up to 2006 (date of judgment).]
>
> 15.3 **Total:** RM1,495 x 11 months x 7 years = RM115,115 20
>
> 16. The partial loss of future earnings of RM114,720 was awarded as follows:
>
> 16.1 **Multiplicand:** RM956 x 12 months
>
> [Note: (a) The Court held that the 2nd Plaintiff could still work and earn RM300 per month. Therefore: RM1,495 – RM300 = RM1,195
>
> (b) The Court deducted a further 20% as living expenses.
>
> Therefore: RM1,195 – 20% = RM956]
>
> 16.2 **Multiplier:** 10 years
>
> [Note: **55 – 35** (age of the 2nd Plaintiff in **1999**)]
>
> 16.3 **Total:** RM956 x 12 months x 10 years = RM114,720 10
>
> 17. By way of illustration:



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18. In all, the Learned Sessions Court Judge awarded a total period of 17 years to the 2nd Plaintiff for loss of earnings.

19. It is humbly submitted that the Learned Sessions Court Judge has erred in the computation of the multiplier as well as the multiplicand for the loss of earnings.

B

[10] The above contention is based on her interpretation of s. 28A(2)(d)(ii) of the Civil Law Act and based on the statutory formula of s. 28A(2)(d)(ii), the maximum number of years' purchase (the multiplier) to be applied cannot exceed the ceiling of ten years C (ie, 55-35 (age of the 2nd respondent) and divided by 2). And since the learned Sessions Court Judge awarded a total of 17 years, she had erred. Further she submitted that since the amendment to the Civil Law Act 1956, there is no distinction between pre-trial loss of earnings and future loss of earnings. For D this contention she relied on the case of *Dirkje Pieternella Halma v. Mohd Noor b Baharom & Ors* [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99 where Gunn Chit Tuan SCJ held as follows:

> During the hearing before us Mr. Gurbachan Singh, leading E Counsel for the appellant, agreed with us that since the amendment of the Civil Law Act 1984, on 1 October 1984, there is no distinction between pre-trial and post-trial loss of earnings. He agreed that as from that date loss of future earnings should be awarded in relation to the time when the plaintiff was injured that is, the date of accident or injury and a proper award for loss F of future earnings made under s. 28A(2)(c) of the Civil Law Act 1956. In this case as the appellant was below the age of 30 years at the time when she was injured s. 28A(2)(d)(i) of the said Act therefore applies.

[11] The above principle case was followed in the case of *Tang* G *Tiew Yong & Ors v. Wong Jong Hoon Anor* [2002] 7 CLJ 455 and in calculating the multiplier the learned judge puts it this way:

> ... the next question that must be determined is, what is the multiplier or number of years' purchase when assessing the H damages for loss of future earnings to the second respondent who was 54 years old when he met with the accident on 23 July 1998? It will be recalled that the learned Sessions Court judge awarded the second respondent "pre-trial loss of earnings" over 20 months. It is the complaint of the appellants that the learned Sessions Court Judge had erred in law when she did so as she I failed to direct her mind to the provisions of s. 28A(2)(d)(ii) of

the Act which sets out the formula for calculating the number of years' purchase (or 5 multiplier) where a person is between 31 and 54 years of age at the time when he is injured. It is the contention of the appellants that if the formula stated in s. 28A(2)(d)(ii) is followed, then the number of years' purchase or the multiplier would only be six months ie, (55-54) divided by two = 1/2 or six months, and not 20 months as awarded by the learned Sessions Court Judge.

... In this regard, I would also refer to *Nagarajan Veerappan v. Ananthan Parama Sivam & Anor* [1989] 2 CLJ 1243; ([1989] 2 CLJ (Rep) 153) where KC Vohrah J (as he then was) took the view that after 1 October 1984, pre-trial loss of earnings no longer forms a head of claim.

This is what the learned judge said:

> Pre-trial loss of earnings for claims arising under the pre-amendment law were and may be claimed as special damages (see *Murtadza v. Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 215) calculated from the date of accident to the date of trial.
>
> The provisions of Section 28A(2), made in 1984, make no mention of this head of damages; and all relevant provisions for the purpose of calculating loss of future earnings refer to the age at the date of accident and not to the age at the date of trial as the figure. It seems to me therefore that there can be no separate head for pre-trial loss.

In a latter part of his judgment, when dealing with the question of whether the 'years' purchase' or multiplier under s. 28A(2)(d)(ii) should be applied directly to the multiplicand or be applied indirectly to it through an annuity table, KC Vohrah J said (at p. 1249 (p. 159)):

> In fact in not allowing for pre-trial loss to be claimed as an item of special damages (as was explained earlier in the judgment) the damages allowable in respect of preamendment claims become subsumed in the damages that become due on the statutory formula leaving the defendant less damages than he would have got for pre-amendment claims.

I respectfully concur with what was said by his Lordship.

[12] Mr. Khaira in his rebuttal submitted that s. 28A Civil Law Act does not apply in this case as there was no total loss of future income. But when asked by me on what authority he relied on, Mr. Khaira could not answer. With respect, his interpretation is in fact contrary to decided cases. (See *Looi Gnan Peng v. Bay Tong Hai* [2005] 1 CLJ 685, *Sumarni v. Yow Bing Kwong and 1 other* [2007] 1 LNS 353).

[13] I now come back to Ms Tang's contention by first looking at s. 28A Civil Law Act 1956 which states as follows:

> 28A Damages in respect of personal injury
>
> [(1)] ...
>
> [(2)] In assessing damages under this section –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) in assessing damages for loss of future earnings the Court shall take into account that –
>
> (i) ...
>
> (ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

[14] Looking at the plain words of s. 28A Civil Law Act, I have no doubt that Ms Tang's contention is correct. What the learned Sessions Court Judge did resulted in an overlap of multipliers or in the use of two multiplier periods which is not allowable under s. 28A of Civil Law Act. Accordingly I find that the learned Sessions Court Judge erred when she used the period of 17 years in calculating the 2nd respondent's loss of earnings. The correct and statutory multiplier is ten years.

[15] As for the contention that under s. 28A of the Civil Law Act there is no distinction between pre trial loss and post trial loss, the recent case of *Sumarni v. Yow Bing Kwong & Another (supra)* appears to cast doubt on it. This is how James Foong Cheng Yuen JCA puts it (p. 13):

> **Loss of earnings**
>
> It is necessary at the outset to clarify the meaning of loss of earnings and loss of future earnings which were used interchangeably in both the plaintiff's pleadings and the judgment of the High Court. It is my view that the former is classified as special damages and the latter as general damages – see *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30. Loss of earnings is normally considered as a pretrial loss. This is the actual amount of earnings lost by a plaintiff as a result of an accident caused by a defendant. In this instance, the plaintiff was not paid by her employer immediately after the accident though her contract with this employer has another 6 months to run. Instead she only received free board and lodging from the time she was discharged from hospital to the time when her work permit expired. This was for a period of 6 months. She has claimed for this loss of earnings in her Statement of Claim, and I believed that she was duly compensated a sum of RM2,100.00 for this category of loss by the Sessions Court and subsequently confirmed by the High Court. In my opinion, the Courts below were correct in allowing this amount to the plaintiff for this category of loss.
>
> **Loss of future earnings**
>
> For loss of future earnings, it is a post-trial loss. It was decided by the Federal Court in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30 that "Future loss of earnings or loss of prospective earnings are awarded for real assessable loss i.e. loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation ... there must be evidence of a real and substantial loss which must not be remote and speculative".

[16] Having read and analyzed the cases on s. 28A of the Civil Law Act, I am inclined to agree with what is stated in *Sumarni*'s case for reasons as stated by the learned judge. It should also be noted that in *Sumarni*'s case the issue whether one can have overlapping multipliers was not discussed. So applying the above principle to the present case, the 2nd respondent is entitled to the following damages:

A i. Loss of earnings – RM115,115 calculated as follows:

7 years loss of future earnings [1999 (date of accident) to 2006 (date of judgment)] at the rate of RM1,495 per month x 11 months x 7 years;

B ii. Loss of future earnings – RM34,416 calculated as follows:

RM956 (RM1,495 – RM300 – 20% as living expenses) x 12 months x 3 years (the balance of the multiplier of 10 years – 7 x years = 3 years) for the balance of the award for loss of
C future earnings, amounting to the sum of RM34,416;

iii. The total award for loss of future earnings would be (RM115,115 + RM34,416) = RM149,531

D **[17]** I have not made any deduction for living expenses for the loss of earnings as this was never argued in the lower court and in Ms Tang's first submission dated 23 January 2008.

[18] To make this part of my judgment complete, I need to mention the recent case of *Fadzly b Nor Rahim & Anor v. Chang*
E *Foh Chin* [2008] 1 PIR 194 which I have had a chance to read and found that the issues there are not the same as here; hence I find no assistance from it. A more relevant case is the Kuching High Court II's decision in Civil Appeal No. 12-05-2007-II where the learned judge disallowed the overlapping of the multiplier
F periods.

Cross Appeal

[19] In respect of item 1, Mr. Khaira firstly submitted that the
G learned Sessions Court Judge erred in awarding RM99,000 for pain and suffering as the defendants' counsel had 'conceded to a minimum amount of RM150,000'. This submission, if one looks at the notes of proceedings, was made under a mistaken impression. Ms Tang had correctly pointed out that there were two
H submissions given to the learned Sessions Court Judge and in the 2nd submission dated 2 November 2006 which is at pp. 165-166 of the record of appeal, it clearly showed that the then counsel for the 2nd appellant had submitted that the amount to be awarded should be RM75,000 and not RM150,000.

I

[20] Secondly he submitted that the amount awarded was excessively inadequate and the proper award should be RM285,000. Ms Tang in her reply submission referred the court to the case of *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 and quoted the following (p. 324-p. 325):

> Now, in an appeal on quantum of damages, it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal Court is slow, indeed, disinclined to interfere with the Judge's finding merely because the appeal Court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the Judgment of the Federal Court in *Topaiwah v. Salleh* [1968] 1 MLJ 284 said that:
>
> > In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. (See *Flint v. Lovell* [1935] 1 KB 354).
>
> ... it is for the appeal Court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the Court is satisfied or convinced that the Judge has acted upon wrong principle of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

[21] I have no doubt that what is stated in the above quotation is the correct statement of law. The learned Sessions Court Judge, prior to coming to her decision, had thoroughly examined numerous cases which, in my view, had relevant bearing on the case at hand (see pp. 17-27 of the judgment). She was fully aware that there may be some overlapping of pain and suffering from the injuries suffered. In concluding this was what she said:

A In the light of the above awards that I had made previously and after taking into account the pain and suffering endured by the 2nd plaintiff through malunion of the fractured bones and subsequent skin grafting operations, as well as the loss of amenities as the result of below knee amputation, I consider a fair and reasonable compensation would be RM90,000.

B

For the fracture of pubic rami and laparotomy and the possible onset of osteoarthritis and intestinal obstruction due to laparotomy, I consider RM20,000 would be fair and reasonable.

C After deducting 10% for the overlapping, the total award for general damage is RM99,000.00 (RM90,000.00 + RM20,000.00 - 10%). I do so award.

[22] Mr. Khaira with respect had not showed to me where the learned Sessions Court Judge had applied the wrong principle of D law in her deliberation and hence I reject the request to change the award of RM99,000.

[23] I now deal with the contention of Mr. Khaira that the learned Sessions Court Judge was wrong in not awarding costs of E hiring a helper. Again the learned Sessions Court Judge had considered this factor and made a finding that she did not need any helper based on the evidence of PW7 the prosthetist.

Court's question:

F With Modulla 111 and regular servicing, would Khatijah be able to get on life normally in the sense that she would not need care and able to do her house chore?

A: Yes.

G **[24]** Again I cannot fault the learned Sessions Court Judge as she had provided valid reasons for her decision in not awarding any damage for the cost of hiring a helper.

Order Of The Court

H **[25]** For all the reasons stated above, I make the following orders:

In respect of the appellants' appeal:

1. The appeal in respect of the Costs of Prosthesis is I dismissed.

2. The appeal in respect of the pre trial loss of income and partial loss of future earnings is allowed.

3. The amount of loss for future earnings is reduced to the sum of RM149,531, particulars are as set out above.

4. Cost is awarded to the appellants only on the basis that they had only been partially successful in their appeal.

[26] In respect of the respondents' cross appeal, it is dismissed with costs (to be taxed unless agreed) to the appellants.